IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, et al.,

Appellants,

v.

JOHN C. PITTENGER, et al.,

Appellees,

and

JOSE DIAZ, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES JOSE DIAZ, ET AL.

Of Counsel:
WILLIAM D. VALENTE,
Villanova, Pennsylvania 19085

STRADLEY, RONON, STEVENS & YOUNG,
Philadelphia, Pennsylvania 19102

WILLIAM BENTLEY BALL,
JOSEPH G. SKELLY,
127 State Street,
Harrisburg, Pennsylvania 1710[illegible]

JAMES E. GALLAGHER, JR.,
C. CLARK HODGSON, JR.,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania 19102

Attorneys for Appellees.

International Printing Co., [illegible] So. [illegible] St., Phila., Pa. [illegible] — Tel. (215) [illegible]

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OPINIONS BELOW.

The majority and dissenting opinions of the District Court are reported at 374 F. Supp. 639 and appear as appendices to the Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, amendment I:

"Congress shall make no law respecting an establishment of religion. . . ."

Act of July 12, 1972, P. L. —, No. 194, Pa. Stat. Ann. tit. 24, Section 9-972 (Supp. 1974).

Act of July 12, 1972, P. L. —, No. 195, Pa. Stat. Ann. tit. 24, Section 9-972 (Supp. 1974).

QUESTIONS PRESENTED.

This appeal presents the following questions:

1. May Pennsylvania, consistently with the Establishment Clause of the First Amendment, provide to children, within the nonpublic (including religious) schools where they are lawfully enrolled, such public welfare benefits as speech, remedial and like services (Act 194) and the use of loaned secular, neutral, non-ideological instructional materials (Act 195)?

2. May such children be denied those benefits, their parents the liberty of choice in education which is aided by the Acts, and the state its choice of means for the achievement of its educational objectives, solely on the ground that the benefits are received by the children in schools wherein they lawfully fulfill a duty of religious conscience?

COUNTERSTATEMENT OF THE CASE.

In Appellants' Statement of the Case, at Page 4 of their Brief, it is stated that "Appellees concede" that included as eligible under the Acts are schools having certain characteristics—among these religiously restrictive admissions and faculty appointment policies, imposition of requirements of attendance at religious instruction and worship, and religious restrictions on what faculties may teach. These allegations were specifically denied by the Commonwealth and by Intervenor Appellees Diaz, *et al.* in their Answers (A27, A30) and remain today both denied and unproved.

Act 194 provides that defined auxiliary services (*e.g.*, guidance, psychological, speech and hearing services) shall be rendered by state employes directly to nonpublic school children in the schools attended by the latter. This program has been in effect throughout the Commonwealth since July, 1972.

Act 195 provides (a) for the loan of state-approved textbooks, upon individual request, to nonpublic school children (b) for the loan to nonpublic schools of such secular, neutral, non-ideological instructional materials (*e.g.*, maps, charts, slides) and instructional equipment (*e.g.*, physical education equipment, laboratory equipment) as are of benefit to the instruction of nonpublic school children and are provided for Pennsylvania's public school children.

Both Acts are amendments to the Public School Code, the General Assembly noting, in its findings, that the Commonwealth had already provided such services and materials to public school children, and that it is the intent of the legislature to assure the providing of these so that "every school child in the Commonwealth will equitably share in the benefits thereof." (A12, A18).

These enactments were challenged by Appellants on the ground that they are unconstitutional, on their face and as applied, as contravening the Free Exercise and Establishment Clauses of the First Amendment. Following Answer by parties Defendant (in which Intervenor Defendants Diaz, *et al.*, raised affirmative constitutional defenses), a trial ensued on Appellants' motion for an injunction. Testimony was taken from ten witnesses. After both sides had rested, Appellants moved to amend their Complaint to limit it to an attack on the statutes on their face, so as to eliminate any res adjudicata effect of a judgment insofar as the Acts were construed and applied by the Commonwealth (JS 13a).[1] The motion was denied. Appellants were offered the opportunity to supplement the testimony, but elected to rest on the record (JS 5a).

The District Court, following trial, on the basis of the pleadings, the stipulations and the evidence presented at trial, on February 14, 1974, handed down an opinion comprising its findings of fact and conclusions of law. The court denied Appellants' application for an injunction against the expenditure of Commonwealth funds pursuant to Act 194. The court granted their request for an injunction with respect to Act 195 but only to the extent of barring loans of such instructional equipment as can, from its nature, be readily diverted to religious purposes.

The court in its opinion noted that the Public School Code "evidences the strong public policy of the Commonwealth that every child of compulsory school age be educated for functional adult citizenship to the level of minimum state standards" and that the challenged Acts are in furtherance of that policy (JS 7a). It pointed out that all the services provided under the legislation "are presently provided for public school children at public expense."

1. The signal "JS" refers to materials to be found in the Jurisdictional Statement.

(JS 8a). Reviewing the decisions of the Supreme Court in Establishment Clause cases, both with respect to tests of "primary effect" and "entanglement", it concluded that state expenditures for education would not violate the primary effect test

> "1. if, although the payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity clearly identifiable as secular or non-religious, or
>
> "2. if, although a property or service is furnished directly to a student, it is clearly identifiable as a secular or nonreligious property or service, or
>
> "3. if, although a payment or service is furnished directly to a secular institution its use is effectively restricted to the secular nonreligious activities of the institution." (JS 21).

Under these guidelines, the District Court held the Auxiliary Services program to have no primary effect advancing religion. The court here relied extensively upon uncontradicted and unchallenged evidence adduced at the trial which, it said, provided "a clear picture of the operation of the act." (JS 28a). The court concluded:

> "We hold that none of the specific auxiliary services listed in Act 194 has the primary effect of aiding religion. Each has the primary effect of meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning. It is true, of course, that a child with vision defects, provided glasses, will be enabled to read the Bible, as a child with hearing defects, provided a hearing aid,

will be enabled to hear the word of God, and as an emotionally disturbed child, given psychological or medical therapy, may become receptive to religious training. But the benefit to religion in such instances is clearly secondary, and such secondary benefit exists no less for children attending public than for children attending nonpublic schools." (JS 36a).

Similarly the court found the Appellants' charges of "entanglement" to be without substance, because the court viewed the proving of entanglement as requiring ". . . a factual inquiry rather than a resort to examination of the face of the statutory issue or to judicial notice about how it may be expected to operate." (JS 24a). Appellants had not produced evidence of entanglement:

"*There is no evidence whatever that the presence of therapists in the schools will involve them in the religious missions of the schools.* . . . Unlike the programs considered in *Lemon v. Kurtzman,* . . . no continuing audit of the nonpublic schools' general instructional program or of their finances is necessary to insure that the services remain secular and non-ideological. *The notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence* . . ." (JS 39a. Emphasis supplied.)

The District Court held Act 195's textbook loan program to be controlled by the Supreme Court's decisions in *Board of Education v. Allen,* 392 U. S. 236 (1968) and *Cochran v. Louisiana State Board of Education,* 281 U. S. 370 (1930) and not to involve impermissible entanglements (JS 41a). The court likewise found the provision for the

loan of instructional materials, under the same Act, to counter neither the primary effect nor entanglement tests:

> "If the public authorities can be trusted with selecting secular, neutral, nonideological textbooks for use by students in religious schools, they can be trusted to make the same judgment with respect to those instructional materials which in this nonsequential age have to some extent replaced textbooks as teaching media. As with textbooks, this statute is, from the point of view of primary effect, largely self-enforcing since by hypothesis the instructional materials will be the same as are made available in the public schools." (JS 44a).
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> • • •
>
> "No greater entanglement is required by the operation of the instructional materials loan program than by the textbook loan program." (JS 45a).

The court treated like instructional materials equipment "which from its nature is incapable of diversion to a religious purpose", but held that the loan of other instructional equipment, which could be readily diverted to a religious use, would fail either the primary effect or entanglement test (JS 49a).

The District Court found the Appellants' charge that the Act would produce political division along religious lines to be a matter requiring proof and here unproved. It likewise found to be without substance Appellants' claim of a violation of the Free Exercise Clause.

The court, in upholding Act 194 and Act 195 (except for the severed portion), stressed that, in addition to Establishment Clause considerations, there must be consideration of the "constitutional status of the relationship between the Commonwealth, children, and parents." This, it said, involved (a) a recognition of the state's interests

in the health and education of children and (b) constitutional recognition of liberty of choice in education (JS 27a).

Higginbotham, J., concurred with respect to the textbook loan program of Act 195 but dissented as to the other provisions of that Act and as to Act 194.

SUMMARY OF ARGUMENT.

Acts 194 and 195 extend certain public welfare benefits, related to child health and education (and which have been provided for children in public schools) to children whose taxpayer parents have enrolled them, pursuant to the compulsory attendance laws, in nonpublic (including religious) schools. These benefits consist of secular, neutral, or nonideological services and materials. That these are of immense and direct individual help to individual children is firmly established in the trial record (in addition to the clear declaration of the legislature as to why it passed the Acts).

Appellants nevertheless move this Court to stop Commonwealth speech therapists from coming to children under Act 194, to take away from these children state-approved textbooks and instructional materials loaned them under Act 195, and to stop a slow-reading child from looking at a state-owned pacer in his own school. These things Appellants urge *solely* on the ground that the school wherein the child receives such benefits is a *religious* school. The Appellants claim that the Establishment Clause requires that, once a child is enrolled in such a school—even though by command of conscience and even though in fulfillment of compulsory attendance requirements—he is rendered ineligible for the good things which public policy says are useful and helpful to all children.

But as the Opinion of the District Court makes clear, the decisions of this Court in Establishment Clause cases present no bar to the Acts in question. Under tests stated by the Supreme Court, the Acts have no primary effect advancing religion and call for no entanglements between the state and religious schools. Appellees totally avoided the opportunity to prove the allegations of their Complaint with respect to those tests.

The Establishment Clause is not to be applied as a cudgel for educational conformity. The decisions of this Court firmly hold that the state cannot exclude any child, because of his faith, from receiving the benefits of public welfare legislation.

ARGUMENT.

I. Appellants' Establishment Clause Claim Is Contradicted by This Court in Allen and by the Factual Record in This Case.

Two points stand out in Appellants' argument on this appeal: their frank demand that the Court overrule its own decision in *Board of Education v. Allen* and their meticulous avoidance of the trial record. The two points are interrelated. Both *Allen* and the trial record stand as roadblocks to Appellants' attempts to secure nullification of Acts 194 and 195. Each upsets Appellants' claims respecting the Establishment Clause—the one by simply spoken constitutional principle, the other by substituting truth for gross imaginings concerning religious schools and the people who teach in them.

1. The relevance of Allen. *Allen* holds that public funds may be used to support a general program for the loan to pupils in nonpublic (including religious) schools of secular instructional items approved for the use of children in public schools. The Court, in *Allen*, directly acknowledges in principle (1) that the instructional items may be used within the premises of a religious school (2) that persons in a religious profession may be involved in the teaching process wherein the instructional items are utilized (3) that the instructional items may be useful or necessary to the carrying on of a school (4) that private (including religious) schools play a significant role in the achieving of legitimate state interests in the educating of children. As can be seen, each of these four factors is found in Act 194 and in Act 195 (considering, in the case of the former, the auxiliary service teacher's service to be roughly comparable to an instructional item "loaned").

As the arguments of the *Allen* appellants vividly showed, every bad result which it is now predicted will surely flow from Acts 194 and 195 was then claimed as sure to flow from this Court's holding that parochial school pupils could constitutionally be let read and handle publicly loaned secular textbooks.[2] The *Allen* claimants warned this Court of the propelling of the nation's liberties beyond the "verge" of safe busing into the void of unsafe reading. There, as here, the appellants divined the mind of the Constitutional fathers who "intended to bar just the type of legislation involved in the present litigation." (Brief, 11[3]). The same ugly charges against the capabilities and ethics of school authorities were leveled, in *Allen,* the same malign insinuations of "strategems" and viewing our Constitution "as an enemy of the people", the same lurid commentaries on the citizenship of religious teachers, and the same finical troublings over such administrative details as request forms, (*cf.,* Brief 24). This Court faced and weighed all of those charges and, even on a record that was meager, was unable to hold that the statute there challenged resulted in "unconstitutional involvement of the State with religious instruction or . . . is a law respecting an establishment of religion . . ." *Board of Education v. Allen,* 392 U. S. 236, 248 (1968). *Allen,* of course, has been repeatedly confirmed in the opinions of this Court. *Tilton v. Richardson,* 403 U. S. 672, 679 (1971), *Committee for Public Education v. Nyquist,* 413 U. S. 756, 775, 37 L. Ed. 2d 948, 964 (1973).

Thus it is clear that the overruling of *Allen* is not useful to Appellants' case merely in the matter of textbooks; it is indispensable to their entire appeal before this Court.

2. See, Brief for Appellants, *Board of Education v. Allen,* Supreme Court of the United States, October Term, 1967, No. 660, 16, 17, 18, 22, 23, 36, 37).

3. "Brief", as herein employed, refers to Brief of Appellants.

2. The relevance of the trial record. In *Allen* this Court refused to strike down, on the basis of judicial notice, a state statute challenged as violating the Establishment Clause:

> "Nothing in this *record* supports the proposition that all textbooks . . . are used by the parochial schools to teach religion. No *evidence* has been offered *about particular schools, particular courses, particular teachers, or particular books.* We are unable to hold *based solely on judicial notice,* that this statute . . . is a law respecting an establishment of religion." (*Allen, supra,* at 248. Emphasis supplied.)

And see *Hunt v. McNair,* 413 U. S. 734, 746 (1973). (The burden of establishing the facts rested with appellant who challenged the expenditure.)

In the present case, Appellants do not merely ask this Court to nullify two state statutes on the basis of judicial notice; incredibly, they want the Court to *ignore* the trial record. From all that can be discovered in the Brief for Appellants, the findings of fact herein (from which dissenting Judge Higginbotham did not except) do not exist.

Appellants hope to make their case before this Court by again inviting the Court to indulge in the sort of supposition (*i.e.,* suspicion) with which, for example, the opinion of the lower court in *Marburger* (which Appellants quote at length) is shot through. This hit-and-run approach, as a means of dealing with the work of legislatures and the interests of children, has the forensic advantage of permitting the delivery of blows without taking the responsibility for them. For example, Appellants' Brief (quoting *Marburger*) *opines* that public teachers offering auxiliary services in religious schools will need surveillance lest they perforce start "reflecting religion". But is that true?

What happens in real life? Is a Lutheran professional psychologist who offers psychological services in a Catholic school in actual danger of starting to "reflect" Catholicism? (A51-A62). The Appellants had every chance in this case to try to prove that ludricrous and demeaning contention. They ducked the chance. Upon the trial they stayed so far away from the world of facts as to scrupulously avoid a single word of cross-examination of the witnesses involved in the program whom Appellees called.

It is high time that the play be called on this approach, which, preferring the twilight gone of cocksure suspicionizing to the light of candid and open examination of real-life people and actual facts, attacks and defames schools, teachers, state officials, persons in religious profession, and indeed the good citizenship of a large part of our American people.

There is in this case a thoroughly developed trial record which relates decisively to every constitutional issue which Appellants themselves have raised. The District Court stated that its opinion, which was based upon the evidence, comprised its findings of fact. Those findings are fundamental to the decision on this appeal.

II. Acts 194 and 195 Make Available to All School Children the Benefits of General Programs of Secular, Neutral, Non-Ideological Services and Materials.

This Court, in *Allen*, noted that the textbook loan program there upheld ". . . merely makes available to all children the benefits of a general program to lend school children books free of charge." *Allen, supra,* at 243. The District Court in the present case similarly found Acts 194 and 195 to extend to all children the benefits of general educational and health related services and instructional

items (JS 7a).[4] The Acts themselves, and the record, fully substantiate the District Court's determination.

The services and materials have long been found important to the education and sound development of children, and have long been previously provided for the benefit of children in public schools. See Pa. Stat. tit. 24, Section 964 (auxiliary services); Pa. Stat. tit. 24, Section 8.801 (textbooks, instructional materials, and instructional equipment). Abundant testimony upon the trial emphasized both the basic importance of these services and instructional items to all children and the unavailability of them, prior to Acts 194 and 195, to children enrolled in nonpublic schools. See testimony of Dr. William D. Boesenhofer (A55-A56), Pauline D. Stopper (A66-A68), David A. Horowitz (A74, A76-A78), May Bense[5] (A95-A97), and Daniel F. X. Powell (A100). This testimony is uncontradicted and uncountered in the record. As in *Allen,* "the record contains no evidence that any of the private schools . . . previously provided textbooks for their students" (*Allen, supra,* at 244, fn. 6), or the services or other instructional items.

III. The District Court Was Correct in Holding the Auxiliary Services Act Constitutional.

The Brief for Appellants presents four objections to Act 194:

1. That it is "open-ended". (Brief, 15-16).

2. That it necessitates "surveillance". (Brief, 16-17).

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4. *Cf., Wolman v. Essex,* — F. Supp. — (D. C. S. D. Ohio, July 1, 1974).

5. Mrs. Bense, the mother of an eight year old deaf child, Johnna, testified that, as the direct result of Johnna's having been able to work with visual remedial materials furnished under Act 195, she was able within one year to transfer from a school for exceptional children to a regular school (A96-A97).

3. That it encompasses schools which have certain "indicia of religiosity". (Brief, 19).

4. That it involves "church and state in sustained administrative relationships". (Brief, 20).

1. Appellants base their charge that the Act is "open-ended" upon its inclusion, in its definition of auxiliary services, of "such other secular, neutral, nonideological services as are of benefit to nonpublic school children . . ." Appellants point out that the "Regulations",[6] Section 1.11, interpret auxiliary services to include bringing pupils below grade to grade level. Bringing pupils below grade to grade level, Appellants conclude, is part of the normal services which a nonpublic school would already have been providing and, therefore, Act 194 relieves religious nonpublic schools of part of their operating costs (with a resulting benefit to religion).

The court below found this contention to be without substance (JS 31a). The argument is not based on fact. Auxiliary services by and large are not mandated as part of basic curriculum requirements in Pennsylvania. See Regulations of State Board of Education, 22 Pa. Code §§ 5.1-5.76. By and large—if not totally—the services are new to the nonpublic school children. The General Assembly made an express finding on that point:

> "Although their parents are taxpayers of the Commonwealth, *these children do not receive auxiliary services from the Commonwealth.* It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child of the Commonwealth will equitably share in the benefits thereof." Act 194, Section 1. (A12. Emphasis supplied.)

6. Presumably meaning Guidelines for the Administration of Acts 194 and 195.

Indeed as the term, "auxiliary", plainly indicates, and as a reading of the Act's definition plainly shows, the services are exceptional, or supportive, or added to, the "normal operations" of the school. Appellants' argument would render the term meaningless.

Upon the trial, witnesses, whose qualifications to speak to the point were unchallenged and whose testimony was uncontradicted, stated emphatically that Act 194 services were *not* part of the normal operations of nonpublic schools. (See testimony and the District Court's discussion thereof. JS 31a-36a). The court below, based on the Act, the Guidelines, the trial record and good sense, correctly dismissed Appellants' argument.

2. Appellants do not cite any facts to support their claim that Act 194 requires "surveillance" of the public school employes who perform the auxiliary services. They prefer to cite *Marburger*,[7] which likewise rested on no facts but rather on the judgments of judges who "just knew" of the taint of religion that would inevitably attach to the public employe who enters within the precincts of a parochial school. *Marburger*, which Appellants here appropriate, paints the following amazing portrait of the public school professional who goes into a religious school to serve children there through performing one of the special services:

1. He or she "is not a textbook" and has "a substantially different ideological character from books." (Brief, 18-19).

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7. *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F. Supp. 29 (1973), *aff'd.* — U. S. —, 94 S. Ct. 3163 (1974), involved a statute which was essentially a parent reimbursement cash subsidy enactment. By Section 7 of the act, the providing of equipment, materials and services is subordinated to the reimbursement provision. There was no provision for loan of textbooks. They were covered solely by reimbursement. There was no evidentiary trial in *Marburger*, and the court therein resorted to assumptions respecting constitutionally critical facts.

2. Though having some sort of "ideological character", he or she will need watching. This is to make sure "that the religious atmosphere has not caused religion to be reflected—*even unintentionally*—in the instruction provided." (Brief, 19).

A worse libel on public school professionals could scarcely be penned. The first part of it—distinguishing teachers from books—is obviously a contrivance to hoist its authors away from *Allen*. In *Allen* the Court took fully into account the fact that books "are critical to the teaching process", *Allen, supra,* at 245. But the teacher, who, under the first part, is endowed with "ideological character", becomes, in the second part, a pliant zombie, lacking will, a mind of his own, personal convictions, character, perceptiveness, faithfulness to his professional standards, or faithfulness to the law of his state and nation.[8]

Since *Marburger* was the mainstay of Appellants in the proceedings below, it appeared appropriate to see whether its presumptions respecting auxiliary service teachers—however fervently believed—were valid. The best and sole way to find out would be to call to the witness stand the very people in question and indeed, to leave them open to the most searching cross-interrogation by those who had advanced the presumptions. The option was, of course, equally open to Appellants; they were free to try to back up their claims with witnesses who would prove the contrary. These things the Appellants chose not to do.

Dr. William D. Boesenhofer, an Intermediate Unit employe performing auxiliary psychological services under Act 194, whose high qualifications as a seasoned professional are set forth upon the record (A51-A52), testified that

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8. *Cf.,* testimony of Pauline D. Stopper (A64-A70).

1. Such services are very important to all children. (A55).
2. Children needing psychological services are found in all schools, both public and nonpublic. (A54).
3. Prior to the enactment of Act 194, such services were available to nonpublic school children only in a public school and upon referral. (A56).
4. It is much more desirable for children that the services be rendered on the nonpublic school premises. (A56).
5. He belongs to the Lutheran Church. (A56).
6. He understands that, under Act 194, he is not permitted to reflect any kind of religion in rendering his services in a nonpublic school. (A56).[9]
7. He considers himself bound to obey the laws of the Commonwealth and of the State and Federal Constitutions. (A56).[10]
8. He is guided not only by such legal restraints but also by the ethical standards of the American Psychological Association which prohibit introducing any kind of religion into a psychologist's practice. Therefore ethically he could not reflect or bootleg any religion through his work as a psychologist. (A59).
9. In offering psychological services in nonpublic schools he has never attempted to influence children in favor of the Lutheran faith. (A57).
10. In offering psychological services in nonpublic schools he has never introduced religious ideas, materials, or subject matter. (A57).

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9. *Cf.*, testimony of Sr. Mary Dennis Donovan (A91-A92).
10. *Ibid.*

11. Performing psychological services in Catholic schools, he has never encountered any disputes with religious authorities in those schools over the precise meaning and extent of the legal restraints against introduction of religion into his work—nor any kinds of problems. (A57).

12. In performing his services in Catholic schools, he has felt no pressure whatsoever to conform to Catholic or other religious views. (A57).

13. No sort of religious atmosphere in those schools has caused him in any way to start reflecting religion in his work in those schools. (A57).

14. If a child in a Catholic or Moravian school or some other religious school would do better in a public institution; he would recommend a transfer to such institution—and has already done this. (A57-A58).

15. In having made such recommendation, and the recommendation that a child be under a male teacher rather than a nun female teacher, he has encountered no resistance, objection or pressure whatsoever on the part of authorities in the Catholic school. (A58).

To identical effect was the testimony of Pauline Stopper, a state-certified speech therapist employed by Carbon-Lehigh Intermediate Unit and performing auxiliary services (A64-A70). David A. Horowitz, Associate Superintendent for Schools for Special Services in the School District of Philadelphia, with forty years of service in the Philadelphia public schools (A71) and having had eight years of experience in administering auxiliary services provided to nonpublic school children under the federal Ele-

mentary and Secondary Education Act (A72-A73), testified:

1. These services are important to all children, to their development, to their education process, to their future vocation. (A74).

2. These services cannot be afforded to nonpublic school children at public centers. (A77-A78).

3. In administering auxiliary services under both ESEA and Act 194 in connection with Catholic schools he knows of no situations wherein religious content or orientation has figured. (A79).

4. His office has fully acquainted both auxiliary service employes and nonpublic school administrators with the legal restraints on religion in the program. (A79-A80).

5. In eight years of involvement in and responsibility for auxiliary services with ESEA, and in connection with Act 194, he knows of no situations or instances wherein the religious atmosphere in a Catholic or other parochial school has caused the auxiliary service teachers in the school to start reflecting religion, even unintentionally, in the instruction they provide. (A80). Had there been any such situations he would have known about them. (A79).

Clearly the record not only fails to support Appellants in their contentions concerning "surveillance" but indeed it firmly establishes that the charge is baseless.

3. As to the program's encompassing schools which have certain indicia of "religiosity", the answer is simple: it aids children in both sectarian and nonsectarian non-

public schools. Certainly, this recycled charge is without vitality. *Bradfield v. Roberts,* 175 U. S. 291, 298 (1899); *Everson v. Board of Education,* 330 U. S. 1, 17 (1947); *Board of Education v. Allen,* 392 U. S. 236, 242 (1968); *Walz v. Tax Commission,* 397 U. S. 664, 672-673 (1970); *Tilton v. Richardson,* 403 U. S. 672, 679 (1971); *Hunt v. McNair,* 413 U. S. 734, 742 (1973).

4. The charge that Act 194 involves church and state in forbidden administrative relationships is in no wise borne out by the terms of the statute and is unsubstantiated by any proof, or even evidence, upon the record. The program had, at the time of trial, been going on for a full year. From February 13, 1973 (the date of the Complaint) onward, the Appellants had publicly maintained and repeated the charge that the program required "excessive governmental entanglement". It is remarkable therefore, that when the time came to put hard proof behind voluble accusation, they took to silence.

The District Court wisely, rightly, and (in terms of the record) inevitably held the Appellants' charge respecting "sustained and detailed administrative relationships" to be baseless (JS 38a-39a).

IV. The District Court Was Correct in Holding Constitutional the Loan of Textbooks and Instructional Materials Under Act 195.

The Brief for Appellants presents objections to the textbook and instructional materials programs:

1. That, to the extent that it is said to be justified by this Court's decision in *Allen,* it is without justification at all, since *Allen* was wrongly decided. (Brief, 20-23).

2. The textbooks are not loaned "upon individual request". (Brief, 24).

3. The nonpublic school is "granted a five percent transportation allowance". (Brief, 24).

4. The textbooks "are not delivered to the children but to the schools." (Brief, 24).

5. Since there has to be an accounting for the items, "surveillance" and "fiscal control" are required. (Brief, 24).

6. Since the nonpublic school is responsible for any expenditures in excess of its allocation, "surveillance, auditing and fiscal control" are required. (Brief, 24-25).

7. "The nonpublic schools are required to maintain an inventory of the textbooks." (Brief, 25).

8. The nonpublic school is required to inform the Department of Education that loaned textbooks become lost, missing, obsolete or worn out. (Brief, 25).

9. The public authority is given the right to look at the nonpublic school's file of certificates of requests for all textbooks loaned. (Brief, 25).

10. The instructional materials provision is "open-ended". (Brief, 25-26).

11. Instructional materials are loaned at the request of schools. (Brief, 26).

12. Instructional materials, unlike textbooks, can be used for religious purposes, including "recruitment campaigns for religious vocations and missionary work". (Brief, 27).

Appellants say that these various points when added up, spell out such a primary effect and entanglement as to violate the Constitution of the United States.

1. Intervenor-Appellees make no answer to the charge that "nothing in the Court's decisions before *Allen* . . . justified the conclusion reached in *Allen.*" (Brief, 23) beyond our view *supra,* that *Allen* is recognized by both sides to be a roadblock to nullification of Act 195.

2. The charge is made that "the Guidelines make no provision for individual requests to the Department of Education." To this statement is cited Section 4.3 of the Guidelines, and Appellants fail to apprise the Court that the following portion of Section 4.13 states:

> "4.13 The nonpublic school or the agency which it is a member shall be responsible for maintaining on file certificates of *requests from parents of children* for all textbook materials loaned to them under this act." (Emphasis supplied.)

Nor do they tell the Court that the Pennsylvania Guidelines adopt exactly the procedure upheld in *Allen:*

> ". . . both parties suggested in their briefs . . . that New York permits private schools to submit to boards of education summaries of the requests for textbooks filed by individual students, and also permits private schools to store on their premises the textbooks being loaned . . . For purposes of this case we consider the New York statute to permit these procedures. So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request." *Allen, supra,* at 244, fn. 6.

3. The charge that "the nonpublic school is granted a five percent transportation allowance" is simply false. Appellants cite Section 4.4 of the Guidelines. Here is how that reads:

> "Five per cent should be allowed in the purchase request for transportation allowances."

The nonpublic school is granted no "allowance". Section 4.4 simply notes that five per cent for delivery costs must be figured in (just as 4 per cent under Section 2.13, for administrative costs), in the determination of what may be spent for textbooks for children in a particular school.

4. The charge that the textbooks are "not *delivered* to the children but to the schools" is again both finical and inapposite. *Allen* recognized that the New York program there considered permitted private schools not only to submit summaries of requests, in bloc, to the State, but also "permits private schools to store on their premises the textbooks loaned . . ." *Allen, supra,* at 244, fn. 6. To have the books mailed (or hand-delivered) as separate parcels to each child in New York participating in the program, would have rendered the program an impossibility. It is ludicrous to suggest that such delivery procedure spells the difference between the Act's being within the Nation's constitution or without it.

5. The Appellants' charge that "surveillance" and "fiscal control" of the "operations of parochial schools" are needed with respect to the textbook loan program is false. The cited Section 4.7 of the Guidelines says nothing of the kind. It merely requires the *Department of Education* to keep *its own* records re *acquisition of textbooks.* Similar rules and regulations for the textbook loan program upheld in *Allen* were before the Court in that case. *Allen, supra,* at 239. And see Brief of Intervenor-Appellees in

Allen, October Term, 1967, No. 660, Supplement 3 (the New York regulations). Those regulations provided that the textbooks, following loan, must continue to be treated as the property of the school district. (*Ibid.*) That requirement clearly imposed a fiscal control (limited to the textbook loan program) and record-keeping.

6. The charge that Section 4.9 requires surveillance, auditing and fiscal control is likewise incorrect. That section does nothing more than provide that if the children in a school make requests in excess of the allowable cost of $12 per child, the school, not the state, is liable for the excess. This is determined from the face of the request and does not involve auditing, surveillance or fiscal control.

7. Appellants' charge that the nonpublic schools are "required to maintain an inventory of the textbooks" only further illustrates the paucity of their efforts to find something—anything—that, combined with like empty charges, will appear to be "cumulative" evidence of unconstitutionality. But no collection of straws will ever make a brick. The short answer is that of course the schools must maintain an inventory, and that fact, while it cuts the legs off the argument that there is no real loan here, creates no problem of entanglement (and indeed Appellants fail to describe whatever entanglement problem they have imagined the inventory creates).

8. So with Appellants' eighth charge: that the schools must inform the Department of Education of textbooks which are lost, worn out, etc. Appellants again do not spell out how this logical corollary to the inventory requirement creates a primary effect or entanglement problem: they are content simply to state their worry—and to let this Court figure out what the legal problem is.

9. Appellants' anxiety over the fact that the public authority is allowed to inspect the file of individual requests for books is not easy to understand in view of the fact that another anxiety of the Appellants (see their second objection above) is that there is really no "individual request" provision in the Guidelines. In any event, such inspection was impliedly sanctioned in *Allen,* since it is an indispensably necessary accompaniment of the accounting procedures therein recognized.

10. Nor will the Appellants' charge, that the instructional materials provision of Act 195 is "open-ended", stand scrutiny. The rule of *ejusdem generis* demands that the meaning of "such other secular [etc.] materials" is to be found in the listing of the educational materials preceding it. *Swartley v. Harris,* 351 Pa. 116 (1945). And see Pennsylvania Statutory Construction Act of 1972, 1 Pa. S. § 1903b. The Guidelines plainly reflect such a construction, and here again, Appellants shied away from any effort to prove that the practice is otherwise.

11. The charge that the instructional materials are loaned at the request of schools was met directly and completely disposed of by the District Court:

> "Nor can we attach constitutional significance to the fact that the schools rather than individual students, become the bailees of the materials. *No evidence* has been presented from which we may infer that secular, neutral, nonideological instructional materials such as audio-visual materials, intended for group rather than individual use, are any more susceptible of diversion to a religious purpose than are textbooks . . . The school is the custodian out of practical necessity because such materials are designed for group or multi-student use." (JS 45a. Emphasis supplied.)

12. Finally, Appellants indulge their alleged concern that "maps, charts and globes" can be used to recruit for "religious vocations and missionary work". So can a geography textbook. So can a school bus. The argument that such instructional materials are "not self-contained and self-explanatory" but are to be used in aid of "oral exposition" goes wide of the mark. The very examples selected—maps, charts and globes—prove the point. A map of Europe may, equally with a geography of Europe or a history of Europe, be read, absorbed and not orally exposed or discussed. And, on the other hand, textbooks are frequently used in all classrooms as starting points and bases for discussion. The court below, with obvious logic stated that ". . . there are no distinctions of constitutional significance" between secular, neutral, non-ideological textbooks and the secular, neutral, non-ideological instruction materials defined in Act 195.

V. The District Court Was Correct in Holding Constitutional the Loan of Secular, Neutral, Non-Ideological Equipment Under Act 195.

The briefly stated objections of Appellants to the instructional equipment loan program were considered by the District Court and specifically rejected. These are that the program helps finance "ordinary expenses" of operating a school, (Brief, 29), and that "much of the permissible equipment can be used for religious purposes." (Brief, 30).

Essentially, Appellants' argument, that the equipment loan provision helps finance "ordinary expenses", simply repeats the same charge which they make with respect to auxiliary services, textbooks, and instructional materials. As has been seen, and as the court below noted, under other provisions of the Public School Code instructional equip-

ment has been furnished to pupils attending public school as part of what is deemed essential to education for functional adult citizenship (JS 7a). As the record establishes, nonpublic school children by and large had not been furnished the free use of such equipment by their schools (A78-A79). Moreover, there would seem to be no logical basis for creating a constitutional distinction between instructional textbooks and those items of instructional equipment which are allowed in the judgment of the District Court. Each is plainly helpful to the educational process. But while many a history text may open up value-related areas, a set of parallel bars, in the minds of practical men, does not. Ideologically, therefore, the allowed instructional equipment is at the core, rather than the periphery, of "secular, neutral, non-ideological" materials. Appellants say that "industrial arts equipment" can be used "to construct crosses, crucifixes and altars; and it is a fair *guess* that in many church schools they are used, *inter alia,* for exactly those purposes." (Brief, 30. Emphasis supplied). But why *guess*? Why not *proof*? It is an obvious gross libel upon these schools to insinuate that they would involve children in such nonsense. It is fantasy to suggest that parents would permit such a use of their children, or that schools "which have contributed so much in educating so many at relatively low cost" (JS 56a) would allow a diversion of their efforts into such preposterous activities.

The District Court held the loan of neutral instructional equipment under Act 195 to fail neither the primary effect or entanglement tests. Appellants, in their brief, say nothing to overset that determination, nor have they produced an iota of evidence to establish their contentions.

VI. The Acts Create No Political Entanglement.

Appellants, though charging that each of the Acts "gives rise to and intensifies political fragmentation and

division along religious lines" (Complaint, A8), avoided any effort to prove that grave contention. The contention not only accuses a state legislature of adopting socially disruptive legislation; by implication it stigmatizes state officials, parents, children and school administrators who work with or benefit by the programs. On the other hand, Appellees proffered a witness of expert qualifications who testified that the Acts would have none of the results claimed in the Complaint (A116-A122). Nothing in the record contradicts or counters that testimony.[11]

VII. The Determination of Constitutionality, Under the Establishment Clause, of the State's Choice of Means in Aiding Children Must Take Into Account Religious Liberty, Liberty of Personal Choice and State Interests in the Health and Education of Children.

Well did the court below say:

> "Thus in legislating upon the education of children the state's choice of means for the achievement of its educational objectives is not restricted only by the establishment clause, and a court considering a constitutional challenge to a state's program must be mindful that the balance struck may be one as to which the alternatives for the achievement of those objectives is limited." (JS 28a).

The District Court thus echoed what has many times been expressed by the Supreme Court in Establishment Clause

11. In upholding an Ohio statute providing certain types of auxiliary services and materials to children in nonpublic schools in *Wolman v. Essex, supra,* the District Court well stated: "We find it difficult to believe that a statute designed to help all students who are physically handicapped or who are emotionally or mentally disturbed or who have some other type of learning problem that requires the expertise of a professionally trained specialist to overcome could fractionalize the electorate along religious lines." Slip op. at 12-13.

cases. In *Walz v. Tax Commission,* 397 U. S. 664 (1970), this Court emphasized the necessity of balancing Free Exercise considerations against Establishment Clause claims:

> "The Establishment and Free Exercise Clauses . . . are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions of the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute.
>
> * * *
>
> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U. S. 664, 668 (1970).

Appellants, however, insist that the Establishment Clause be treated as a simple and absolute rule which states the mind of the Constitutional fathers on Acts 194 and 195. That rule decrees that the decision of a parent in the America of the 1970s to enroll his child in a religious school must necessarily be fatal to important incidents of that child's citizenship. Public programs which all agree are good for all children must be denied *that* child, so the Fathers are said to have thought, although the compulsory attendance laws, universal education, the requirements of participating in a modern industrial society and its extensive taxation of the population were unknown to them. The inevitable effect of such a construction is plain: a child must be excluded from the enjoyment of the benefits of public welfare programs designed for children unless he enrolls in a public school.

As the District Court indicated, such a construction would cause a direct overriding by the Establishment Clause of other clauses of the Constitution protective of personal liberty [12] (JS 27a-28a). The liberty of choice in education recognized in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) must then become, for many children, in today's economy, a liberty in theory only. And as Appellees' Answer asserts, to deny a child the public welfare benefits of remedial, speech and other auxiliary services, or of loaned neutral instructional items, *solely on the ground that he fulfills the requirements of compulsory attendance in a school wherein he also fulfills a duty of religious conscience*, would appear to deny him the equal protection of the laws in an area of fundamental right. Further, such a construction carries the assumption that some judgments of states as to sound child welfare and educational policy must—irrespective of their intrinsic merit—be nullified. Such a construction finds no historical justification, nor is justification for it found in the decisions of this Court.

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12 ". . . our duty is to interpret the two clauses [Establishment and Free Exercise] in a sensible and realistic fashion with a view to achieving whatever reconciliation is reasonably consistent with the purpose and intention of the Founding Fathers. Repeatedly the Supreme Court has recognized that the sweeping unqualified language of the Establishment Clause cannot be literally enforced but must be construed to accommodate *other fundamental rights.*" *Wilder v. Sugarman*, — F. Supp. — (D. C. S. D. N. Y., November 19, 1974) (Slip op. 22. Emphasis supplied).

CONCLUSION.

It is respectfully submitted that this Court should Affirm the judgment below.

Respectfully submitted,

Of Counsel:
WILLIAM D. VALENTE,
Villanova, Pennsylvania.
19085

STRADLEY, RONON, STEVENS & YOUNG,
Philadelphia, Pennsylvania.
19102

WILLIAM BENTLEY BALL,
JOSEPH G. SKELLY,
127 State Street,
Harrisburg, Pennsylvania.
17101

JAMES E. GALLAGHER, JR.,
C. CLARK HODGSON, JR.,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania.
19102

Dated December 19, 1974.